conviction under section 414 of the Penal Code. That being the evidence of the lady who witnessed the transaction, the evidence of the fowl dealer who bought the four turkeys from the appellant. and the evidence of the complainant who identified his four turkeys.

Counsel for the appellant has submitted that the sentence is manifestly excessive in view of the proved facts. In my view, the decision of the learned magistrate in regard to sentence is clearly a decision in the exercise of his discretion. It is now accepted that interference with such an exercise can only be justified if the learned magistrate had acted on some wrong principle, committed some error of law, or failed to consider matters which demanded consideration. I cannot think that in dealing with matters of sentence the learned magistrate committed any error of law. Nor did he fail to consider all matters demanding consideration. Nor did he act on any wrong principle.

Both the appeals against conviction and sentence are dismissed.

I have been told by counsel on behalf of the appellant that his client had been imprisoned for 71 days. The circumstances leading to his imprisonment are that his counsel had failed to file the notice of appeal in time, whereby the appellant was re-arrested and remanded for 71 days, after which he successfully applied for bail. Therefore, in my view, this period of 71 days which he has undergone should be deducted from the term of imprisonment imposed by the lower court.

Appeal dismissed.

Solicitors: *Wan Mustapha & Co.*

MOHAMED BIN SALLEH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) December 6, 1966]

[K.L. — F.C. Civil Appeal No. X 33 of 1966]

Criminal Law and Procedure — Trial — Adjournment of court before close of prosecution case to view locus in quo — Questions put to accused by jurors — Admission by accused.

In this case the appellant had been charged with murder. Before the close of the prosecution the court adjourned to view the *locus in quo*. This was done at the request of the defence counsel who explained that his object in requesting the view was to determine whether a person standing on the steps of the deceased's house was visible from a particular point. At the same time the jurors questioned the accused and he made a statement which was in effect an admission that he was at or near the scene of the crime.

Held: it is contrary to established principles in a criminal trial to permit the jury to question the accused before the close of the prosecution case. This mistake amounted to more than a mere irregularity. The fact that the defence counsel did not object cannot cure a mistake which must have inevitably prejudiced the appellant. Since the trial was thus vitiated there was no alternative but to quash the conviction and order a retrial.

CRIMINAL APPEAL.

Appellant in person.

Syed Agil Barakbah (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was tried before a judge and jury in the High Court at Kota Bharu on a charge of murder, but was convicted of housebreaking, an offence punishable under section 454 of the Penal Code, and was sentenced to four years imprisonment. We allowed his appeal and ordered a retrial on grounds which we intimated would be delivered later.

The grounds of appeal merely raised misdirections by the learned trial judge as to the law and the facts relating to the offence of housebreaking, but there were no merits on either ground. The conviction, however, was quashed for a far more serious reason which seemed to have been overlooked all round because, perhaps, the record had not been scrutinised with the care that such a case and, indeed, every case deserves.

The facts are free of all complications, although the prosecution case rested entirely on circumstantial evidence. During the night of November 21-22, 1965, a middle-aged woman, Sa'adiah binti Haji Umat, was murdered in the bedroom of her house at Kampong Bukit Saji, Gual Periok, District of Pasir Mas. She was living alone, and her death was discovered by her niece, Bidah, and the latter's husband, Mohammed, who called at the deceased's house at daybreak, on November 22. The appellant, a rubber-tapper, who lived some miles away at Kampong Bukit Tandak, was arrested on November 27. In his possession were found $78 in cash, a gold ring and a goldsmith's receipt. He was duly identified by the goldsmith, who stated in his evidence that the appellant had sold him four bangles, a chain and a locket for $152 early on the morning of November 23. These articles had been melted down and made into other jewellery, with the exception of the locket, which Mohammed and Bidah were, or claimed to be, able to identify as the property of the deceased.

Three prosecution witnesses, Mohammed, his wife Bidah, and a neighbour of the deceased, Ahmad, claimed to have seen the appellant in the vicinity of the deceased's house shortly before the discovery of the crime. In fact, Mohammed and Bidah went further: they said that they actually saw the appellant descending the steps of the deceased's house. They were cross-examined by defence counsel on their identification of the appellant and it was clear from the

very outset that the presence of the appellant at or near the scene of the crime was going to be the crucial question on which the jury would be required to give their verdict. It was elicited in cross-examination that neither Mohammed nor Bidah had disclosed in their statements to the police that they had seen the appellant at the scene. It was not clear from the record whether Ahmad, the neighbour, had reported to the police of having seen the appellant in the vicinity.

Before the close of the prosecution the court adjourned to view the *locus in quo*, where defence counsel explained that his object in requesting the view was to determine whether a person standing on the steps of the deceased's house was visible from a point marked 'X' in the sketch plan Ex. P.12. I now quote from the record what took place there:—

"Jurors then stood at a point 'X' and looked in the direction of the said steps. *On being questioned by the jurors through court, the accused indicated* the path taken by P.W.4 in taking P.W.2's daughter and his own to school, the path going in the direction of Putat Tujoh which passed in front of the deceased's house, and shown on Ex. P.12."

Eventually defence counsel submitted that the prosecution had failed to make out any case for the defence to answer and when the ruling was given against him the appellant elected to say nothing. Irreparable damage, of course, had already been done. The jury, who should not have been permitted to question the appellant on any account at that stage, had done so and obtained what in effect was an admission on the very issue which he was strenuously contesting. This was tantamount to calling on the defence in the middle of the prosecution case and the accused was not even given the option of saying nothing, as he had every right to do.

It matters not that the appellant was found not guilty on the charge of murder. He was still found guilty of the lesser offence under section 454 by the jury who could not have failed to bear in mind the appellant's statement during the view. It need hardly be pointed out that what happened was contrary to all established principles in a criminal trial — not a mere irregularity. The fact that defence counsel did not object cannot cure a mistake which must have inevitably prejudiced the appellant. Since the trial was thus vitiated we have no alternative but to quash the conviction and order a retrial.

In one respect, however, it must be pointed out that the trial was not a nullity. Although the learned trial judge omitted, perhaps by inadvertence, to enter an acquittal on the charge of murder — which he should have done — the jury's verdict in the appellant's favour must stand because he is clearly entitled to plead *autrefois acquit* hereafter. The retrial, therefore, will be on such other charge as the public prosecutor deems fit.

Appeal allowed.

TOH KUM SWEE v. ONG KING SENG

[O.C.J. (Chua J.) December 7, 1966]

[Singapore — Suit No. 1812 of 1965]

Practice and Procedure — Attachment — Attachment of defendant's equity of redemption in property — Property sold by mortgagees — Whether sale valid — Whether sheriff justified in not selling the attached equity of redemption — R.S.C. 1934, O.XLI, r. 7.

The plaintiff had obtained judgment against the defendant and had obtained an order attaching the defendant's interest in properties, which had been mortgaged to the Chung Khiaw Bank Ltd. The bank as mortgagees sold the properties by public auction. The plaintiff requested the sheriff to sell the defendant's interests in the properties, alleging that the sale by the bank was void under O. XLI, r. 7 of the Rules of the Supreme Court. The sheriff refused to do so on the ground that he had nothing to sell, unless he was indemnified. The plaintiff applied to the court for an order that the sheriff show cause why he did not sell the properties.

Held: on the facts of the case the sheriff held the view that he had nothing to sell, which view was not without merit and was justified in asking the plaintiff for an indemnity if the plaintiff wanted him to sell. The sheriff had, therefore, shown good cause why he did not sell the properties seized.

MOTION TO SHOW CAUSE.

K. S. Chung for the plaintiff.

Ho Thian Cheh (Sheriff) in person.

Cur. Adv. Vult.

Chua J.: This is a motion by the plaintiff, under Order XLIV rule 9 of the Rules of the Supreme Court, for an order that the Sheriff of Singapore do show cause why he did not sell the properties seized by him under a writ of seizure and sale.

In order to appreciate the position in which the sheriff found himself in, it is necessary to set out the events that took place, with some detail, before and after the writ of seizure and sale was issued. The events are these:

The defendant is the sole proprietor of S. K. Ong Rubber Estate. By an indenture of mortgage dated the 25th May, 1963, made between the defendant and the Chung Khiaw Bank, Ltd. the defendant mortgaged his properties No. 20 Cable Road, No. 100-D Hollywood Apartments and No. 106-B Hollywood Apartments, to the bank to secure the current account of S. K. Ong Rubber Estate up to a limit of $67,000 and interest thereon.

By clause 6(7) of the mortgage the mortgagee was expressly given the right to exercise his power of sale upon giving the mortgagor fourteen days notice to pay all the sums due